



## **U.S. Copyright Office**

### **37 CFR Part 210**

**[Docket No. 2020-5]**

#### **Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment**

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Supplemental interim rule.

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**SUMMARY:** The U.S. Copyright Office is issuing a supplemental interim rule relating to certain reporting and payment requirements of digital music providers and related duties of the mechanical licensing collective under the Music Modernization Act. The amendment extends a previously adopted transition period pending further rulemaking by the Office regarding reports of adjustment. Based on the imminent expiration of the existing transition period and recent public comments requesting further proceedings on the subject of adjustments, the Office has determined that there is a legitimate need to make this amendment, effective immediately.

**DATES:** Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Rhea Efthimiadis, Assistant to the General Counsel, by email at [meft@copyright.gov](mailto:meft@copyright.gov) or telephone at 202-707-8350.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

The Orrin G. Hatch-Bob Goodlatte Music Modernization Act (the “MMA”) substantially modified the compulsory “mechanical” license for reproducing and

distributing phonorecords of nondramatic musical works under 17 U.S.C. 115.<sup>1</sup> It did so by switching from a song-by-song licensing system to a blanket licensing regime that became available on January 1, 2021 (the “license availability date”),<sup>2</sup> administered by a mechanical licensing collective (the “MLC”) designated by the Copyright Office (the “Office”).<sup>3</sup> Digital music providers (“DMPs”) are able to obtain this new mechanical blanket license (the “blanket license”) to make digital phonorecord deliveries of nondramatic musical works, including in the form of permanent downloads, limited downloads, or interactive streams (referred to in the statute as “covered activity” where such activity qualifies for a blanket license), subject to various requirements, including reporting obligations.<sup>4</sup> DMPs also have the option to engage in these activities, in whole or in part, through voluntary licenses from copyright owners.

*A. The Office’s September 2020 and May 2022 Rules*

On September 17, 2020, as a part of its work to implement the MMA, the Office issued an interim rule adopting regulations concerning reporting requirements under the blanket license (the “September 2020 Rule”).<sup>5</sup> As relevant here, those interim regulations included requirements governing annual reporting and the ability to make adjustments to monthly and annual reports and related royalty payments, including to correct errors and replace estimated inputs with finally determined figures.<sup>6</sup>

After enactment of the September 2020 Rule, the Office received a request from the DLC to modify it, prompted by operational and compliance concerns. After carefully

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<sup>1</sup> Pub. L. 115-264, 132 Stat. 3676 (2018).

<sup>2</sup> 17 U.S.C. 115(e)(15).

<sup>3</sup> As permitted under the MMA, the Office also designated a digital licensee coordinator (the “DLC”) to represent licensees in proceedings before the Copyright Royalty Judges (the “CRJs”) and the Office, to serve as a non-voting member of the MLC, and to carry out other functions. 84 FR 32274 (July 8, 2019).

<sup>4</sup> 17 U.S.C. 115(d).

<sup>5</sup> 85 FR 58114 (Sept. 17, 2020).

<sup>6</sup> 37 CFR 210.27(f), (g)(3) and (4), (k).

evaluating the DLC’s request and the then-existing rulemaking record, the Office decided to make various amendments through a supplemental interim rule and request for comments issued on May 24, 2022 (the “May 2022 Rule”).<sup>7</sup> The May 2022 Rule provided extensive background on requirements relating to monthly reports of usage, annual reports of usage (“AROUs”), and reports of adjustment (“ROAs”), including with respect to timing, invoices, and response files.<sup>8</sup> The Office assumes familiarity with both the September 2020 Rule and May 2022 Rule and their detailed explanations of these issues.<sup>9</sup>

In brief, and as relevant here, the May 2022 Rule established an invoice and response file process for ROAs (and by extension, AROUs that are combined with ROAs).<sup>10</sup> Under these regulations, if there is an underpayment of royalties, the DMP must pay the difference to the MLC either contemporaneously with delivery of the ROA or promptly after receiving an invoice from the MLC.<sup>11</sup> In those circumstances where the DMP will receive a response file from the MLC, the MLC must deliver the invoice to the DMP contemporaneously with the response file.<sup>12</sup> The MLC must otherwise deliver the invoice to the DMP in a reasonably timely manner.<sup>13</sup> If requested by the DMP, the MLC must deliver a response file no later than 45 days after receiving the ROA, unless the

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<sup>7</sup> 87 FR 31422, 31424–27 (May 24, 2022).

<sup>8</sup> *Id.* at 31422–23.

<sup>9</sup> To date, this proceeding has involved multiple rounds of public comments through a notification of inquiry, 84 FR 49966 (Sept. 24, 2019), a notice of proposed rulemaking, 85 FR 22518 (Apr. 22, 2020), and an *ex parte* communications process. In addition to the September 2020 Rule and May 2022 Rule, the Office has issued two other supplemental interim rules. 85 FR 84243 (Dec. 28, 2020); 86 FR 12822 (Mar. 5, 2021). Guidelines for *ex parte* communications, along with records of such communications, including those referenced herein, are available at <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html>. All MMA rulemaking activity, including public comments, can currently be accessed via navigation from <https://www.copyright.gov/music-modernization>.

<sup>10</sup> 87 FR 31425–27.

<sup>11</sup> 37 CFR 210.27(k)(4).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

ROA is combined with an AROU, in which case the response file must be delivered within 60 days.<sup>14</sup> Acknowledging that the MLC would need time to implement these regulations, the May 2022 Rule provided a transition period ending on February 24, 2023, during which the MLC is not required to deliver invoices or response files within the specified timeframes.<sup>15</sup>

In response to the May 2022 Rule, the Office received relevant comments from only the MLC and DLC.<sup>16</sup> At a high level, the MLC objected to the invoice and response file timelines in the rule. It asserted operational concerns related to waste, inefficiency, and burden if required to comply with the May 2022 Rule’s timeframes for delivering invoices and response files to DMPs for ROAs.<sup>17</sup> The DLC did not object to the MLC’s position on this issue.<sup>18</sup> The MLC also proposed that, instead of permitting DMPs to pay additional royalties promptly after receiving an invoice from the MLC, they should always have to pay adjusted royalties contemporaneously with delivery of the ROA to the MLC.<sup>19</sup> The DLC disagreed on this point, stating that “the option [for DMPs] to make

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<sup>14</sup> *Id.* § 210.27(k)(8).

<sup>15</sup> *Id.* § 210.27(k)(9).

<sup>16</sup> DLC Supplemental Interim Rule Comments (July 8, 2022) (“DLC Comments”); MLC *Ex Parte* Letter (Oct. 17, 2022); DLC *Ex Parte* Letter (Nov. 18, 2022); MLC *Ex Parte* Letter (Dec. 21, 2022).

<sup>17</sup> MLC *Ex Parte* Letter at 3–4, 8 (Oct. 17, 2022) (asserting, for example, that it would be “wasteful and burdensome” if the MLC is not allowed to abstain from processing a DMP’s adjustments to royalty reporting for 2021 or 2022 until the MLC receives the DMP’s ROA implementing the CRJs’ final determination in the ongoing *Phonorecords III* remand proceeding, because the forthcoming final determination will require all DMPs to retroactively adjust streaming royalties for those years, thereby rendering moot all adjustments previously submitted); *id.* at 4–6 (asserting, for example, that the MLC’s “efficient and effective blanket license administration will be hindered if adjustments are required to be processed as they are received” because it “would necessarily preempt The MLC’s ability to reprocess unmatched uses because reprocessing would have to be put on hold for each adjustment”).

<sup>18</sup> DLC *Ex Parte* Letter at 3–6 (Nov. 18, 2022) (stating that the DLC has “no objection in principle to the MLC’s request to delay processing of [2021 and 2022] adjustments” and that it “supports giving the MLC relief from its deadlines to process reports of adjustment and provide invoices and response files”).

<sup>19</sup> MLC *Ex Parte* Letter at 6–8 (Oct. 17, 2022).

royalty payments for adjustments only after receiving an invoice from the MLC should remain in place.”<sup>20</sup>

Having reviewed these comments, the Office is considering revising the May 2022 Rule. However, as discussed below, because at least some of the issues surrounding adjustments may be impacted by the unresolved issue of the relationship between adjustments and late fees, the Office has concluded that it should conduct further proceedings before proposing any amendments.

### *B. Late Fees*

The issue of late fees is not new to this proceeding. As previously detailed by the Office, stakeholders, including the MLC and DLC, disagree about whether late fees adopted by the CRJs for late payments of royalties apply to adjustments.<sup>21</sup> The Office previously declined to adopt a rule addressing the interplay between the CRJs’ late fee regulation and the Office’s provisions for adjustments because it was not clear at the time of the September 2020 Rule that doing so would be the best course “particularly where the CRJs may wish themselves to take the occasion of [the *Phonorecords III*] remand or otherwise update their operative regulation in light of the [September 2020 Rule].”<sup>22</sup> At the time, the Office said it would instead “monitor the operation of this aspect of the [September 2020 Rule], and as appropriate in consultation with the CRJs.”<sup>23</sup>

Since the September 2020 Rule, however, the CRJs have not taken any action on the late fee issue and have not indicated an intent that they plan to do so. At the same time, the MLC’s and DLC’s comments in response to the May 2022 Rule again raised the

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<sup>20</sup> DLC *Ex Parte* Letter at 6 (Nov. 18, 2022).

<sup>21</sup> 85 FR 58136–37 (discussing the DLC’s request “for language to ensure DMPs are not subject to late fees for adjustments to estimates” and the MLC’s request “to add language prescribing that no use of an estimate changes or affects the statutory due dates for royalty payments or the applicability of late fees to any underpayment of royalties that results from using an estimate”); 85 FR 22530; *see* 37 CFR 385.3; 17 U.S.C. 115(d)(8)(B).

<sup>22</sup> 85 FR 58137.

<sup>23</sup> *Id.*

issue and confirmed their continued disagreement on the issue.<sup>24</sup> Both the MLC and DLC requested the Office provide guidance.<sup>25</sup> The DLC requested that the Office “specify that when both the initial estimated payments and the later adjustment of such payments to account for the updated and finalized information are made according to the timelines established in the regulations, such payments are proper and have been made by the ‘due date for payment’ as set forth in 17 U.S.C. § 115(d)(8)(B)(i).”<sup>26</sup> The MLC opposed the DLC’s position<sup>27</sup> and instead proposed regulatory language providing that nothing in the adjustment provisions “shall change a blanket licensee’s liability for late fees, where applicable.”<sup>28</sup> Other parts of the MLC’s comments on adjustments also touched on the issue of late fees. For example, discussing its opposition to allowing DMPs to avoid paying adjusted royalties until after receiving an invoice, the MLC argues that “[f]ull payment of royalties is due and owing from the original due date of each month’s royalties.”<sup>29</sup>

### *C. Further Proceedings on Adjustments and Late Fees*

In sum, resolution of when royalties are “due” and when late fees are incurred could be relevant to the adjustment issues being considered by the Office. The Office therefore finds it prudent to consider both issues concurrently. It intends to publish a notification of inquiry in the near future to expand the public record on the late fee issue before publishing a proposed rule. Once it has evaluated the relevant comments, the Office plans to issue a notice of proposed rulemaking that jointly addresses both late fees

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<sup>24</sup> MLC *Ex Parte* Letter at 8 (Oct. 17, 2022); MLC *Ex Parte* Letter at 2–5 (Dec. 21, 2022); DLC Comments at 3.

<sup>25</sup> See 85 FR 58136–37; MLC *Ex Parte* Letter at 8 (Oct. 17, 2022); MLC *Ex Parte* Letter at 2–5 (Dec. 21, 2022); DLC Comments at 3.

<sup>26</sup> DLC Comments at 3.

<sup>27</sup> MLC *Ex Parte* Letter at 2–5 (Dec. 21, 2022).

<sup>28</sup> MLC *Ex Parte* Letter at 8 (Oct. 17, 2022).

<sup>29</sup> MLC *Ex Parte* Letter at 2 (Dec. 21, 2022).

and the other concerns raised in response to the May 2022 Rule (*e.g.*, regarding the timing of royalty payments, invoices, and response files for adjustments).

## **II. Supplemental Interim Rule**

One component of the May 2022 Rule, however, must be amended immediately to provide the Office with sufficient time to conduct these further public proceedings: the current February 24, 2023 expiration of the MLC's transition period. Based on the MLC's and DLC's comments discussed above, the Office is extending the length of the MLC's transition period during the pendency of the Office's further rulemaking activity in this area. To provide flexibility, the new rule provides that the MLC's transition period ends 30 days after receiving written notice from the Office. Prior to that time, as noted above, the Office expects to issue a superseding rule addressing the underlying issues as part of further public proceedings surrounding adjustments.

Because of the short amount of time remaining before the expiration of the MLC's current transition period on February 24, 2023, and based on the MLC's unopposed assertions that complying with the May 2022 Rule's timelines is operationally problematic, the Office finds that there is good cause to adopt this supplemental interim rule without public notice and comment, and to make it effective immediately upon publication.<sup>30</sup>

### **List of Subjects in 37 CFR Part 210**

Copyright, Phonorecords, Recordings.

### **Interim Regulations**

For the reasons set forth in the preamble, the U.S. Copyright Office amends 37 CFR part 210 as follows:

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<sup>30</sup> See 5 U.S.C. 553(b)(B), (d)(3).

**PART 210—COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING  
PHYSICAL AND DIGITAL PHONORECORDS OF NONDRAMATIC MUSICAL  
WORKS**

1. The authority citation for part 210 continues to read as follows:

**Authority:** 17 U.S.C. 115, 702.

**§ 210.27 [Amended]**

2. Amend § 210.27(k)(9) by removing “February 24, 2023” and adding in its place “30 calendar days after receiving written notice from the Copyright Office”.

**Dated:** January 26, 2023.

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**Shira Perlmutter,**

*Register of Copyrights and*

*Director of the U.S. Copyright Office.*

Approved by:

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**Carla D. Hayden,**

*Librarian of Congress.*

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